

GREGORY J. HATLEY
DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.
The Milwaukee Station, Third Floor
101 River Drive North
P.O. Box 2103
Great Falls, Montana 59403-2103
Telephone: (406) 761-5243
Attorneys for Plaintiff

FILED

MAY 02 2013

By: Lori Maloney, Clerk
S. MCGOWAN
Deputy Clerk

MONTANA SECOND JUDICIAL DISTRICT COURT, SILVER BOW COUNTY

.....
AUDIT SERVICES, INC., a Montana
corporation,

CAUSE NO. DV-13-140

Brad Newman
Judge, Dept. II

Plaintiff,

-VS-

COMPLAINT

NELCON, INC. a Montana
corporation, and OHIO FARMERS
INSURANCE COMPANY

Defendants.

.....

PLAINTIFF COMPLAINS AND ALLEGES:

COUNT ONE

I.

That the Defendant NELCON, INC. (NELCON) is an employer engaged in the construction industry in the State of Montana and has agreed to be bound by the terms of certain collective bargaining and trust agreements.

II.

That the Trust Funds listed on Exhibit "A" attached hereto were established for the purpose of providing health and welfare, retirement, vacation and training

benefits for employees whose employers have agreed to be bound by collective bargaining agreements with the laborer and operating engineer unions in Montana, which unions are parties to certain agreements and declarations of trust by which the Trust Funds listed on Exhibit "A" were created. That all of the Trust Funds listed on Exhibit "A" are commonly referred to as "employee benefit plans," as that term is used in Section 502(d)(1) of the Employee Retirement Income Security Act, as amended, 29 U.S.C. § 1132(d)(1).

III.

That NELCON has been a party to and has agreed to be bound by collective bargaining agreements with the local laborer and operating engineer unions in Montana, said collective bargaining agreements covering the wages, hours, conditions of work and terms of employment for the laborer and operating engineer employees of NELCON while performing work on that certain Montana Department of Transportation Federal Aid Project Nos. STPP 29-4(26)87 & STPP 29-4(24)87, located in Silver Bow County, Montana. Under these agreements, NELCON also agreed to be a party to the trust agreements establishing the Trust Funds listed on Exhibit "A." Said agreements obligate NELCON for the periods mentioned on Exhibit "A" to make timely contributions to the Trust Funds listed on Exhibit "A" for all hours worked by NELCON's laborer and operating engineer employees covered by said collective bargaining agreements. Pursuant to the trust agreements by which the

Trust Funds listed on Exhibit "A" were created, an employer who is delinquent and not timely in the payment of contributions is also required to pay liquidated damages, interest and audit fees to the Trust Funds.

IV.

That NELCON has breached its collective bargaining and trust fund obligations by failing and refusing to contribute to the Trust Funds listed on Exhibit "A" in accordance with the provisions of the applicable collective bargaining and trust agreements.

V.

That said collective bargaining and trust agreements obligate NELCON to pay said Trust Funds the sums specified on Exhibit "A" attached hereto and by this reference made a part hereof. That NELCON has failed and refused to pay the sums specified on Exhibit "A" although payment has been demanded. That the Trust Funds listed on Exhibit "A" are entitled to appropriate equitable relief from the Court, which relief includes, but is not limited to, a judgment compelling NELCON to specifically perform its obligations under said collective bargaining and trust agreements by paying the amounts specified on Exhibit "A."

VI.

That prior to the commencement of the above-entitled action, the Trustees of the Operating Engineers A.G.C. Trust Funds and Laborers A.G.C. Trust Funds listed

on Exhibit "A" assigned and transferred all right, title and interest in and to their claims for the sums listed on Exhibit "A" to the Plaintiff, Audit Services, Inc., who is now the owner and holder thereof and entitled to payment of all sums of money based upon NELCON's specific performance of its obligations owed to said Trust Funds, as set forth on Exhibit "A."

VII.

That NELCON is obligated under the terms of the trust agreements establishing the Trust Funds listed on Exhibit "A" and is further obligated pursuant to Section 502(g)(2)(D) of the Employee Retirement Income Security Act, as amended, 29 U.S.C. Sec. 1132(g)(2)(D), to pay reasonable attorney's fees for the prosecution of any claim or action for the recovery of any sums due to Plaintiff's assignors. The Plaintiff has been compelled to employ attorneys to represent it in this action and has employed the law firm of Davis, Hatley, Haffeman & Tighe, P.C., Attorneys at Law, Great Falls, Montana, and that the Plaintiff is entitled to recover from NELCON reasonable fees to be fixed by the Court.

COUNT TWO

VIII.

Plaintiff realleges and incorporates herein by reference paragraphs I through VII, inclusive of Count One above.

IX.

That the sums due and owing to the Plaintiff as specifically itemized on the attached Exhibit "A" relate to hours worked by NELCON's laborer and operating engineer employees on that certain Montana Department of Transportation Federal Aid Project Nos. STPP 29-4(26)87 & STPP 29-4(24)87, located in Silver Bow County, Montana.

X.

That as a condition of NELCON's contract with the State of Montana covering NELCON's work on Montana Department of Transportation Federal Aid Project Nos. STPP 29-4(26)87 & STPP 29-4(24)87 and pursuant to § 18-2-201, M.C.A., NELCON, as Principal, executed and delivered a Contract Bond covering all work performed on said project and conditioned on NELCON faithfully paying all laborers, mechanics, subcontractors and materialmen who performed work and furnished material on the project. Said bond was obtained from the Defendant OHIO FARMERS INSURANCE COMPANY, identified therein as the Surety. A true and correct copy of said Contract Bond (Bond #5957258) is attached hereto as Exhibit "B."

XI.

The Trust Funds identified on Exhibit "A," attached hereto and in accordance with § 18-2-204, M.C.A., presented and filed with the Montana Department of

Transportation a Notice of Claim against the Contract Bond #5957258, said claim identifying the amounts due and owing as itemized on Exhibit "A" attached hereto. This Notice of Claim was further provided to NELCON, as the Principal, and OHIO FARMERS INSURANCE COMPANY, as the Surety, under said Contract Bond.

XII.

That the Defendants NELCON and OHIO FARMERS INSURANCE COMPANY have wholly failed and refused to pay the amounts outstanding as itemized on Exhibit "A" attached hereto, said amounts being due and owing as a result of hours worked by NELCON's laborer and operating engineer employees on Montana Department of Transportation Federal Aid Project Nos. STPP 29-4(26)87 & STPP 29-4(24)87.

XIII.

That the Defendant NELCON, as principal, and the Defendant OHIO FARMERS INSURANCE COMPANY, as surety, are now jointly and severally liable to the Plaintiff for the sums specified on Exhibit "A," including any and all attorney's fees awardable herein, in accordance with the terms and conditions of said Contract Bond.

WHEREFORE, Plaintiff demands judgment against the Defendants, jointly and severally as follows:

1. For contributions, liquidated damages, interest and audit fees in the sum of ONE HUNDRED FORTY-EIGHT THOUSAND SEVEN HUNDRED TWO DOLLARS AND SEVENTY-EIGHT CENTS (\$148,702.78);

2. For such additional interest as may accrue prior to entry of judgment and for interest on the judgment as allowed by law.

3. For Plaintiff's reasonable attorney's fees in an amount to be fixed by the Court;

4. For costs of suit and for such other and further relief as to the Court may seem meet and just in the premises.

DATED this 1st day of May, 2013.

DAVIS, HATLEY, HAFFEMAN & TIGHE, P.C.

By **GREGORY J. HATLEY**
GREGORY J. HATLEY
P.O. Box 2103
Great Falls, Montana 59403-2103
Attorneys for Plaintiff

Exhibit A

EXHIBIT "A"CONTRIBUTION LIABILITY FOR PERIOD OF
APRIL 15, 2011, THROUGH MAY 27, 2012

TRUST	CONTRIBUTION	LIQUIDATED DAMAGES	INTEREST	OTHER	TOTALS
Laborers A.G.C. Trust Fund	\$ 14,691.70	\$ 1,469.16	\$ 1,496.84		
Laborers A.G.C. Pension Trust Fund	\$ 6,933.15	\$ 702.18	\$ 706.37		
Laborers A.G.C. Training Trust Fund	\$ 1,155.54	\$ 350.00	\$ 117.74		
Laborers A.G.C. Southwest Montana Vacation Savings Trust Fund	\$ 3,301.50	\$ 397.66	\$ 336.37		
MLMA	\$ 165.10		\$ 16.83		
SUBTOTALS	\$ <u>26,246.99</u>	\$ <u>2,919.00</u>	\$ <u>2,674.15</u>	\$ <u>0.00</u>	\$ <u>31,840.14</u>
Montana Operating Engineers Construction Industry Health & Security Trust Fund	\$ 49,802.51	\$ 9,960.50	\$ 4,035.96		
Central Pension Fund of the International Union of Operating Engineers & Participating Employers Trust Fund	\$ 28,183.21	\$ 5,636.66	\$ 1,724.56		
Montana Operating Engineers A.G.C. Joint Apprenticeship & Training Trust Fund	\$ 2,601.53	\$ 690.53	\$ 212.26		
Montana Operating Engineers A.G.C. Vacation Trust Fund	\$ 8,671.75	\$ 1,741.05	\$ 707.50		
MM\MLMA	\$ 607.05		\$ 49.52		
Audit Fees				\$ 2,238.05	
SUBTOTALS	\$ <u>89,866.05</u>	\$ <u>18,028.74</u>	\$ <u>6,729.80</u>	\$ <u>2,238.05</u>	\$ <u>114,624.59</u>
TOTALS	\$ <u><u>116,113.04</u></u>	\$ <u><u>20,947.74</u></u>	\$ <u><u>9,403.95</u></u>	\$ <u><u>2,238.05</u></u>	\$ <u><u>148,702.78</u></u>

Exhibit B

BOND # 5957258CONTRACT BOND

Ohio Farmers Insurance Company
 P.O. Box 5001
 Westfield Center, OH
 44251

KNOW ALL MEN BY THESE PRESENTS, Nelson Inc. herein called the Principal, and Ohio Farmers Insurance Company, corporations licensed under the laws of Montana and hereafter all called the Surety, are held and bound unto the State of Montana, herein called the State, in the full sum of Nine Million Two Hundred Seventy-Eight Thousand Four Hundred Fifty-Two dollars and thirty-five cents, (\$9,278,452.35) to be paid to the State or its assigns, to which payment we bind ourselves, our heirs, executors, administrators and successors, jointly and severally, firmly by this Bond.

Signed and sealed with our respective seals and dated this 21st day of October, 2010.

WHEREAS, the Principal has entered into a Contract with the State by its Department of Transportation, hereafter Department, for a project in Silver Bow County (ISS); State of Montana Federal aid Project Notes: STPP 29-4(26)87 & STPP 29-4(24)87, for the sum of Nine Million Two Hundred Seventy-Eight Thousand Four Hundred Fifty-Two dollars and thirty-five cents, (\$9,278,452.35) and,

WHEREAS, it is a condition of the Contract's award by the Transportation Commission and Montana law that this Bond be executed;

NOW, THEREFORE, the condition of this obligation is such that if the Principal shall: in all respects faithfully perform all of the provisions of the Contract and its obligations thereunder; and well, truly and faithfully complete all work of the Contract in a manner satisfactory to the Department; and protect, indemnify and save harmless the State as stated in the Contract and from any liability for payment of wages due or material furnished the Principal; and pay all laborers, mechanics, subcontractors and material suppliers who perform work or furnish material under the Contract; pay all persons who supply it or subcontractors with provisions, provender, material or supplies for performing the work; and pay and discharge all lawful taxes and assessments levied by state, county and municipal authorities; and obtain and maintain insurance in accordance with the Specifications, then this obligation will be complete and will terminate; otherwise, it shall remain in full force and effect and the Department may take appropriate action against this Bond.

SIGNATURES AND SEALS: (Seal [if corporation])

Nelcor Inc
Contractor Name

Authorized Agent Signature

Authorized Agent Printed Name

Authorized Agent Title

Witness Signature

Witness Printed Name

Surety Agency Name: Pete Brady Agency, Inc.

Address: 713 Wentworth Ave W, Mendota Heights MN 55120

Countersigned by: Not Required

Montana Resident Agent Signature

Printed Name

Surety Company: Ohio Farmers Insurance Company

By:

Attorney-in-Fact

Printed Name

Surety Company:

By:

Attorney-in-Fact

Printed Name

Surety Company:

By:

Attorney-in-Fact

Printed Name

For MDT use only:

Reviewed By:

Attorney, Montana Department of Transportation

Surety Company Name: Ohio Farmers Insurance Company

Authorized in Montana: ☒ Yes ☐ No, Authorized Surety: ☒ Yes ☐ No A

Information provided by: Wayne Barker of the State Auditors Office

MDT Employee Name: Stephanie Thomas

RETURN TO:
CONTRACT PLANS BUREAU
MONTANA DEPARTMENT OF TRANSPORTATION
2701 PROSPECT AVE
PO BOX 201001
HELENA MT 59620